93-334

No. _____

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In The

Supreme Court of the United States

October Term, 1993

NICK GARCIA,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, and WARREN LUTTRELL,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth District Of Texas

PETITION FOR WRIT OF CERTIORARI

PAUL E. KNISELY
Counsel of Record

BROADUS A. SPIVEY
SPIVEY, GRIGG, KELLY & KNISELY
P.O. Box 2011
Austin, TX 78768
512/474-6061 (Fax 512/474-1605)

GILBERT I. LOW
ORGAIN, BELL & TUCKER
470 Orleans St.
Beaumont, TX 77701
409/838-6412 (Fax 409/838-6959)

Counsel For Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the improper submission of an "unavoidable accident" instruction to the jury by the Texas state trial court in this FELA case constituted reversible error as a matter of federal FELA law, requiring a new trial on Petitioner's claims for injuries arising out of the crash-landing of an airplane which Respondents were using for "deadheading" Petitioner and fellow Southern Pacific railroad crew members from New Mexico to Texas.

2. Whether as a matter of federal FELA law the Respondent railroad or the other Respondents involved in the for-profit transportation of Petitioner and fellow railroad crew members by aircraft were negligent per se in conducting an unauthorized commercial aircraft operation in violation of Part 135 of the Federal Aviation Regulations.

LIST OF PARTIES

PETITIONER:

NICK GARCIA

RESPONDENTS:

SOUTHERN PACIFIC TRANSPORTATION COMPANY
JACKIE HOLMES
MIKE WARREN
SOUTHWEST AIR LEASING
GENE'S FLIGHT CLUB OF EL PASO
WARREN LUTTRELL

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Nick Garcia, Petitioner in this cause, and files this Petition for Writ of Certiorari, requesting that the Supreme Court reverse the judgments of the Texas state courts below in favor of Respondents and remand this cause for a new trial on Petitioner's personal injury claims under the FELA.

As grounds for such relief, Petitioner would respectfully show as follows:

OPINIONS BELOW

The opinion of the Ninth District Court of Appeals of Texas is unpublished. *Garcia v. Southwest Air Leasing,* Cause No. 09-91-00284-CV (Tex. App. – Beaumont 1993, writ denied). That opinion is attached to this petition as Appendix A.

The Order of the Supreme Court of Texas denying Petitioner's application for writ of error is attached as Appendix B.

This petition for writ of certiorari is filed because the opinion and judgment of the Beaumont Court of Appeals denying Petitioner a new trial on his FELA claims conflicts with Federal law governing FELA jury trials.

JURISDICTION

The Beaumont Court of Appeals affirmed the take-nothing trial court judgment for Respondents on December 3, 1992. Petitioner's motion for rehearing in that court was denied on January 7, 1993. The Supreme Court of Texas denied Petitioner's application for writ of error on April 14, 1993, and denied Petitioner's motion for rehearing of the application on June 3, 1993.

This petition for writ of certiorari is filed within 90 days after the final denial of review by the highest Texas court. The Supreme Court's jurisdiction is founded on 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The Federal Employers Liability Act (FELA) provides:

> **Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable in**

> **damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .**

45 U.S.C. § 51.

The controlling Federal Aviation Regulation (FAR) states:

> **No person may operate an aircraft under this Part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part. . . .**

FAR § 135.5.

STATEMENT OF THE CASE

This is an FELA case arising from the crash-landing of a single-engine Piper Lance airplane carrying four Southern Pacific railroad employees. The incident occurred on August 2, 1988, in El Paso, Texas.

1. The Parties

The parties, and other principal persons and entities in this case, are:

NICK GARCIA – Petitioner in this case and plaintiff in the trial court. Mr. Garcia was 37 years old and had been employed by Southern Pacific for 17 years at the time of his back injury in the plane crash in 1988. He resides in El Paso, Texas, with his wife and one child.

SOUTHERN PACIFIC TRANSPORTATION COMPANY (Southern Pacific) – Respondent in this case and a defendant in the trial court. Southern Pacific is Petitioner Garcia's employer and had contracted for the use of the

airplane to transport ("deadhead") Petitioner and other train crew members from out-of-state terminals back to their homes in El Paso.

JACKIE HOLMES – Respondent in this case and a defendant in the trial court. Holmes was an employee of Southern Pacific. Holmes purchased the airplane, but was barred by Southern Pacific's conflict-of-interest policies from doing business with the railroad. Holmes devised a profit-sharing arrangement with Mike Warren whereby Holmes, using Warren's name and the assumed name of "Southwest Air Leasing" as a cover, contracted with Southern Pacific to transport the railroad's employees in Holmes's plane, using contract pilots from Gene's Flight Club of El Paso.

MIKE WARREN – Respondent in this case and one of the defendants in the trial court. Warren, in exchange for a share of the profits to be earned by Jackie Holmes, acted as a "front" for Holmes in negotiating and signing the contract with Respondent Southern Pacific for the transportation of railroad employees in Holmes's airplane.

SOUTHWEST AIR LEASING – Respondent in this case and a defendant in the trial court. This "entity" does not have a separate legal existence; it was merely a name under which Respondents Holmes and Warren were operating to provide air transportation of railroad employees under their arrangement with Southern Pacific.

GENE'S FLIGHT CLUB OF EL PASO – Respondent in this case and a defendant in the trial court. Gene's Flight Club provided pilots for the Southern Pacific flights on the Piper airplane under an arrangement with Respondents Southern Pacific, Holmes, and Warren. Gene's Flight Club furnished Respondent Warren Luttrell to pilot the Piper airplane for the

first time on the flight which resulted in the crash in question.

WARREN LUTTRELL – Respondent in this case and a defendant in the trial court. Mr. Luttrell was the pilot of the Piper aircraft which crashed on the occasion in question when he elected to try to land during a thunderstorm in El Paso.

SOUTHWEST AVIATION, INC. – A general aviation and aircraft service company in El Paso. It was formerly a party defendant in this case, but a summary judgment was granted in its favor because it was concluded that this entity did not play a role in the obtaining or performing the contract for transporting the Southern Pacific employees. Respondent Mike Warren had falsely held himself out as an officer of "Southwest Aviation, Inc." in some of his negotiations with the railroad for the use of Holmes's airplane.

2. The Plane Crash – How It Happened

On August 2, 1988, a single-engine Piper airplane crashed while attempting a landing at the El Paso International Airport during a severe thunderstorm. As the airplane approached El Paso, it encountered violent weather, and the pilot was repeatedly warned by the approach control and tower personnel of the thunderstorm and consequent wind-shear hazard over the airport. Proceeding nonetheless to attempt to land, the pilot lost control of the aircraft when it was struck by a wind shear over the runway; it crash-landed, injuring three of the four passengers seriously. Nick Garcia was one of the passengers; he sustained a serious and permanent lower back injury as a result of the crash.

The evidence at trial showed that Southern Pacific has contracted for the use of the airplane to "deadhead"[1] some of its employees from Tucumcari, New Mexico, to El Paso, Texas.[2] On August 1, the day before the crash, Petitioner Garcia and co-worker, Duke LeClair, had been part of a crew that operated a Southern Pacific train from El Paso to Tucumcari, a distance of about 330 rail miles. There they met the members of another train crew, Floyd Nelson and Clifford Printz. The four of them stayed overnight and were scheduled by Southern Pacific to be deadheaded back to El Paso the next day.

Commercial pilots for the deadheading flights for Southern Pacific were hired from Gene's Flight Club of El Paso, Inc. The pilot who usually handled the flights was unavailable on August 2, so Respondent Warren Luttrell was hired to fly the Piper airplane on that occasion. Luttrell had never before flown that particular airplane.

Luttrell flew from El Paso to Tucumcari, where he picked up the four men for the return trip. Though there was some disagreement among the witnesses about how rough the flight back from Tucumcari was, it is undisputed that the weather worsened as they neared El Paso, and that during their approach a severe thunderstorm

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[1] The term "deadheading" is used by railroad workers to describe how the railroad transports them from one railroad terminal to another. A "deadhead" has been defined as: "An employee riding on a pass. A non-paying passenger." R.F. Adams, *Language of the Railroads,* p. 42 (Univ. of Okla, Press, 1977).

[2] The peculiar arrangements entered into among the Respondents for the use of the airplane are described further below. Their plans and schemes for making the deadheading operation a profitable enterprise also form the basis for Petitioner's contention below that Respondents were negligent per se in conducting business as a commercial air transport carrier without an FAR-mandated certification.

was in progress on the field at the El Paso International Airport.

At 3:54 p.m., Luttrell contacted the El Paso airport's approach control. At 4:06 p.m., when the plane was 42 miles from the airport, Luttrell was advised by controllers that the airport "went IFR" (instrument flight rules); it was closed to landings by VFR (visual flight rules). Luttrell responded that the airplane was IFR-equipped, and he persisted in asking for clearance to land instead of altering his flight or delaying for a short while to allow the thunderstorm to dissipate or move away from the vicinity of the airport.

Luttrell admitted at trial that the thunderstorm was clearly visible from more than 20 miles from the airport. His passengers all testified that they could see huge black storm clouds and lightning bolts over the airport, and that the storm obscured much of the nearby mountains and surrounding landscape. The flight became very turbulent and was frightening to the passengers. It began raining hard as they neared the airport. The heavy thunderstorm and rain continued throughout the final approach and landing.[3]

At 4:09 p.m., approach control advised Luttrell that the official visibility at the airport was less than one-eighth of a mile, which is below the minimum even for IFR landings. It was undisputed that Luttrell, the pilot in command – not the control tower – had the ultimate right to determine whether to land or not to land under those conditions. Luttrell elected to try to land.

At 4:11 p.m., Luttrell was "handed off" from the approach control to the airport tower. Fifteen seconds later, Luttrell received clearance to land, but the tower

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[3] The evidence reflects that the thunderstorm in El Paso that day was so severe that the rain collapsed the roof on a supermarket very near the airport.

also issued a **wind shear warning** to him and specifically admonished him that there was a **"thunderstorm in progress over the airport."** At 4:13:05 p.m., the tower issued **another wind shear warning** to Luttrell.

At 4:15:34 p.m., the tower tried to contact Luttrell, but received no response. At 4:15:59, the tower was alerted to an emergency signal (ELT) from the aircraft which is triggered by impact. At 4:16:41, the tower was contacted by Luttrell, who notified the tower that the plane was on the runway and was disabled.

It is undisputed that the aircraft encountered and was buffeted by a **wind shear** as it was just a few feet off the ground preparing to land.[4] The aircraft was thrust sideways by the wind. Luttrell tried to realign the plane with the runway, but the airplane's stall warning beeper and stall buzzer actuated in succession, and Luttrell had to increase his airspeed suddenly to avert a stall. The airplane then simply "stopped flying" and dropped the last 15 feet or so to the ground. It bounced back into the air several feet, skidded down the wet runway through the rain for about 200 feet, and came to rest on its nose at the side of the runway.

The damage to the aircraft as a result of the crash included a mangled propeller and a collapsed nose wheel. It required approximately $19,000 to repair, inspect, and return the airplane to flying condition.

Respondent Luttrell based his claim at trial that he had not acted negligently on his recollection that the thunderstorm had "moved away from the part of the

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[4] A "wind shear" is a sudden updraft or downdraft of air due to air pressure differentials; it is a very serious hazard to aircraft and is particularly prevalent when thunderstorms are present. This meteorological condition is well-known by all pilots to be extremely dangerous, especially during landing.

airport" where he was landing. However, all of the airplane passengers disputed that testimony. In addition, it was undisputed that the runway upon which Luttrell was landing was closed by the tower to VFR traffic, and though he claimed he had it in sight, the runway was closed because the visibility was below VFR and IFR minimums. Luttrell further admitted that multiple wind shears are present throughout thunderstorms and that they create powerful forces which are extraordinarily dangerous during an approach to landing.

Norman Horton, an aeronautics specialist called by Petitioner as an expert witness, testified that wind shear can literally tear an aircraft apart; a pilot should *always* stay away from a thunderstorm to avoid the possibility of encountering a wind shear. He testified that Luttrell clearly was negligent in landing the aircraft under the conditions existing at the El Paso airport at the time.

3. Petitioner's Injuries

Petitioner Garcia and the other passengers in the airplane did not initially discern that they had suffered serious injuries in the accident. However, Mr. Garcia, as well as Mr. LeClair and Mr. Nelson, promptly sought medical treatment for the bruises and pain they sustained from being jolted and thrown about during the crash-landing.[5]

Nick Garcia was "beaten and bruised" after the crash. He had to take several days off work. He obtained medical treatment for lower back pain, and he was

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[5] Mr. LeClair and Mr. Nelson have since undergone significant medical treatment for injuries sustained in the accident. On December 4, 1992, LeClair and Nelson settled their own claims against Southern Pacific arising out of the plane crash for a combined total of $900,000.

referred to Dr. Arthur Bieganowski, an orthopedic specialist. The doctor diagnosed and treated Mr. Garcia for a herniated disc at the L5-S1 vertebrae. As a result of the injury, Mr. Garcia has undergone a disectomy and faces the possibility of additional surgery. Dr. Bieganowski testified that Mr. Garcia's herniated disc was directly caused by the jolt in the accident, and that it has resulted in permanent injury and impairment to him.

The cost of the medical care which Petitioner has received for his injuries amounted to $68,636.68 as of the time of trial. Additionally, Southern Pacific still has Petitioner placed on work restrictions which preclude him from working in the operations department because of his medical condition from these injuries.

4. The Southern Pacific/Holmes/Warren Arrangement

In late 1987 and early 1988, Southern Pacific entertained a series of proposals from Respondents Jackie Holmes and Mike Warren to transport train crews in the El Paso area between their "away-from-home terminals" and their "home terminal" by use of a private airplane. For a per-mile charge, Holmes and Warren proposed to deadhead the crews by plane rather than have them ride back home on their much slower freight trains. The plan was ostensibly offered as a means to try to save expense to the railroad by reducing the number of man-hours spent on transportation of workers.

In March of 1988, Holmes, a Southern Pacific conductor, purchased a six-seat Piper Lance aircraft from Southwest Aviation, Inc. However, as a Southern Pacific employee, it was a company-prohibited conflict of interest for Holmes to do business with the railroad. So in the meetings and negotiations with the railroad for the use of the airplane, Holmes's associate Mike Warren falsely held himself out as an officer of "Southwest Aviation, Inc.," while Holmes stayed in the background and used Warren

as a go-between. The records nonetheless showed, and the facts developed at trial confirmed, that executives of Southern Pacific were well aware of Jackie Holmes's thinly-disguised involvement in the negotiations.

In a letter dated December 8, 1987, on "Southwest Aviation, Inc." stationery and signed by "Michael J. Warren, Vice-President," Warren confirmed with Southern Pacific's Division Superintendent that "Southwest Aviation, Inc." was committing itself to provide a "charter passenger service" to Southern Pacific at a rate of 50 cents per aircraft mile. On February 16, 1988, an initial service contract with the railroad was signed by Warren as "President" of "Southwest Aviation, Inc."

On March 3, 1988, Holmes purchased the plane from Southwest Aviation, Inc.

Southern Pacific officials thereafter signed two additional contracts for the use of the plane. The first of these contracts, dated June 21, 1988, was signed by the railroad and sent to Warren for execution by "Southwest Aviation, Inc." Warren was out of town when that contract arrived for execution, so Holmes marked out the designation of "Southwest Aviation, Inc." on the contract **and signed it himself as "Jackie Holmes d/b/a S.W. Air Leasing."**

Holmes testified that the contract which he executed was rejected by the railroad because of his signature on it. The railroad sent another contract, also dated June 21, 1988, which was then signed by **"Mike Warren, Pres. Southwest Aviation, Inc.,"** and that contract was then accepted by Southern Pacific. Holmes admitted that Warren's name was used because Holmes needed a third party to contract with the railroad. In return for the use of his name, Warren was to receive ten percent of any profits which Holmes realized from the use of the plane.

It is now undisputed that Mike Warren was ***not*** an officer of Southwest Aviation, Inc., and had no authority to sign the contract on behalf of that company. Of course,

the company no longer even owned the airplane at the time the June 21 contract was executed, having sold it to Holmes in March. [6]

After the final contract was entered into – ostensibly with "Southwest Aviation, Inc.," but in reality with Holmes and Warren – the Piper aircraft was employed by the railroad not only to deadhead workers, but also to haul freight for the Railroad and to *fly railroad executives and officers*. Southern Pacific paid Holmes for the use of the plane for such purposes at the same rate as for the deadheading trips.

Warren Luttrell was paid by Southern Pacific for his services as a pilot on August 2, 1988.

4. Procedural History Of This Case

This suit was filed on May 29, 1989, in the 58th District Court of Jefferson County, Texas.[7] Petitioner's pleadings allege claims under the FELA as well as common law. Petitioner's FELA causes of action are based on both ordinary negligence and negligence per se, the latter for violation of Federal Aviation Regulations by Respondents in carrying out their for-profit air transport operation without a required commercial operator's certification.[8]

Respondents all filed answers denying liability.

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[6] It turned out that Warren's use of Southwest Aviation, Inc.'s name was totally unauthorized and that the company had no involvement in the Holmes-Warren Southern Pacific scheme for the use of the airplane.

[7] Petitioner's trial pleading was Plaintiff's First Amended Petition; it was filed on July 8, 1991.

[8] Though Respondent Southern Pacific, as Petitioner's employer, cannot be held liable for any causes of action other than under the FELA, the other Respondents could additionally be liable for common-law negligence.

The case proceeded to a jury trial on July 15, 1991. At the close of the evidence, the trial court submitted its charge to the jury with instructions and questions. The court specifically instructed the jury to consider whether the plane crash was an "unavoidable accident," as follows:

> "Unavoidable accident" means an occurrence may be an "unavoidable accident," that is, an event not proximately caused by the negligence of any party to it.

Petition's counsel objected to this instruction because there was no evidence in the record to justify injecting "unavoidable accident" into the case.

The court then submitted a single, global liability question relating to all of the Respondents. Attempting to encompass both the FELA claims and any common-law negligence causes of action, the question was framed (and answered as follows:

QUESTION NO. 1:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, and injury, if any, to Nick Garcia:

Answer "Yes" or "No" to each of the following:

	Answer "Yes" or "No"	
	Proximate Cause	Cause in whole or in part
a. Jackie Holmes	No	No
b. Warren Luttrell	No	No
c. Gene's Flight Club of El Paso, Inc.	No	No
d. Mike Warren	No	No
e. Southern Pacific	No	No

The jury's verdict was returned on July 22, 1991. It was against the Petitioner and in favor of all of the Respondents. The jury's "no" answers to all parts of the only liability question submitted ended the jury's inquiry.

On August 12, 1991, the trial court rendered a take-nothing judgment on the verdict. The Beaumont Court of appeals affirmed the judgment on December 3, 1992, and on January 7, 1993 denied Petitioner's motion for rehearing.

The Supreme Court of Texas denied Petitioner's application for writ of error on April 14, 1993, and denied Petitioner's motion for rehearing of the application on June 3, 1993.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED BECAUSE THE SUBMISSION OF AN "UNAVOIDABLE ACCIDENT" INSTRUCTION TO THE JURY IS INCONSISTENT WITH AND VIOLATIVE OF THE WELL-ESTABLISHED STANDARDS OF LIABILITY APPLICABLE TO PERSONAL INJURY CLAIMS UNDER THE FELA AND CONSTITUTES REVERSIBLE ERROR AS A MATTER OF FEDERAL SUBSTANTIVE LAW.

A. The trial court's submission of the "unavoidable accident" instruction to the jury constituted a fundamental and prejudicial violation of the substantive principles of federal FELA law which neither Texas state court submission practice nor Texas common law may supersede or violate.

B. The Texas court of appeals erred as a matter of federal FELA law in failing and refusing to reverse the trial court for submitting the instruction to the jury on "unavoidable accident" when there was no evidence of an "unavoidable accident" and the instruction directly affected the sole liability issue submitted to the jury.

The Texas state courts have disregarded the critical fact that Petitioner Nick Garcia is a railroad worker whose personal injury case is subject to the provisions of the Federal Employers Liability Act (FELA), 45 U.S.C. § 51, et seq. When he went to work as a brakeman for Southern Pacific, Nick Garcia forfeited all of his common law rights against his employer for recovery for his injuries. This "forfeiture" was mandated by Congress in exchange for providing to railroad workers the specific protections, benefits, and advantages afforded through the FELA's special liability system.

This Court has long held that the FELA provides a substantive federal cause of action that cannot be destroyed or lessened by state rules of practice or procedure. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). The FELA's liberal statutory liability standards displace state and federal common-law doctrines, including even the concept of proximate cause. As this Court has recognized, the FELA was enacted precisely because

> the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. ***The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.***

Rogers, 352 U.S. 507-8.

Although Petitioner Garcia's injuries occurred in an unusual railroad-related aviation accident, *it is undisputed that Petitioner and the other railroad workers who were passengers on the plane were being transported by and for Respondent Southern Pacific, and that they were in the course and scope of their employment for the railroad at the time of the accident.* As a matter of law Petitioner's claims for damages against Southern Pacific arising from his injuries are therefore controlled by the substantive provisions of the FELA.

The state trial judge's manner of submitting Petitioner's case to the jury – particularly the submission of the unwarranted instruction on "unavoidable accident" at the behest of Respondents – reflects a failure to appreciate and properly apply the unique principles of the FELA and constitutes reversible error. There was no evidence in

this case to justify or support an instruction on unavoidable accident even under common-law principles, but it was especially improper and prejudicial to Petitioner to give the jury such an instruction in conjunction with the submission of his FELA claim.

The extent to which this Court has insisted on strict compliance with the statutory liability standards in the submission of FELA actions is illustrated by the Court's decision in *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409 (1985). In that case, the Court reversed a decision by the Missouri state court of appeals that had upheld the failure to give a jury an instruction on "present value" in assessing damages in an FELA case. Holding that such an instruction is required as a matter of federal law, the Court rejected the argument that the absence of the instruction was purely a procedural matter governed by the state's pattern FELA jury instructions. The Court said:

> As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. Although the Court's decisions in this area "point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure,' " *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949), it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law.

470 U.S. at 411.

The propriety of instructions on the proper *liability* standards, and the determination of whether reversible error is presented by an incorrect instruction to the jury regarding those standards, are equally, if not more so, issues of substance which must be determined by federal law. In light of this Court's command to follow the letter of the federal law governing FELA liability, the trial court

in the present case committed fundamental error in treating Petitioner's FELA claim against Respondents as if it were governed by Texas common-law principles, particularly the regressive doctrine of "unavoidable accident."

In *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), the Fifth Circuit expressly rejected the contention that an instruction should have been given on "unavoidable accident" in an FELA case:

> Following again faithfully our admonition that 'ordinarily in [an FELA] case . . . a charge on unavoidable accident is confusing and tends to distract the jury's attention from the simple issues,' . . . the trial judge declined, over objection of the railroad, to submit a definitive issue on unavoidable accident. We fully approve. Experience demonstrates that in a charge properly structured, there is no need for it and hence no place for one.

Id. at 825. Later in the *Page* opinion, the Fifth Circuit, in addressing the propriety of a "sole proximate cause" instruction by the trial judge, made further reference to the unavoidable accident issue:

> [W]e deem it a matter of good judicial administration to point out now, as we did formerly on unavoidable accident, that ordinarily in FELA cases there is really no place for this issue in the jury submission as such. All of these collateral devices so dear to the heart of Texas bred and Texas trained lawyers immersed in its complex system of special issues submission are in reality merely a submission in another form of questions already implicit in the basic ones. . . . This effort to cross-examine the jury – whether special interrogatories are used or in outlining the successive fact findings as a predicate for a general verdict – leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute lawyer.

Id. at 826-27. The Fifth Circuit's rejection of a jury instruction on unavoidable accident in an FELA case was reaffirmed in *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609, 614 (5th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967).[9]

The opinion of the Beaumont court of appeals affirming the trial court's judgment in the present case denigrates these holdings and disregards the significance of the trial court's departure from the substantive federal principles of law imposed by the FELA. Rather than addressing the "unavoidable accident" instruction, the opinion skirts the issue entirely, instead focusing solely on the Beaumont court's own, baseless *sua sponte* proposition that the jury might *possibly* have believed that Nick Garcia did not sustain his back injury in the airplane accident, and therefore any errors in the charge by the trial court were "harmless" because Petitioner did not challenge that obscure *possibility* on appeal.

This reasoning puts the cart before the horse. As a matter of federal law, Petitioner was entitled to have the "injury" determination, as well as the "negligence" and "causation" determinations, resolved by the jury without improper, extraneous considerations affecting (or infecting) that determination. The "unavoidable accident" submission must be deemed harmful precisely *because* it clouded the jury's consideration of the entire FELA cause

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[9] The impropriety of an "unavoidable accident" instruction has been recognized by the Texas state courts. In *Continental Oil Co. v. Lindley*, 382 S.W.2d 296, 303 (Tex.Civ.App. – Houston 1964, writ ref'd n.r.e.), the court, citing U.S. Supreme Court precedents, observed that "it seems questionable whether the defense of unavoidable accident is available to a defendant in an FELA case. . . . " *Id.* at 303. The court in *Lindley* resolved the unavoidable-accident issue in that case on another ground, holding that the requested submission of unavoidable accident was properly refused because – as is true in the present case as well – *there was no evidence raising the unavoidable accident issue. Id.* at 304.

of action, and because we therefore cannot know by what rationale the jury concluded that none of the Respondents was liable. An improper FELA submission cannot casually be dismissed as "harmless error" by a state appellate court when the state common-law instruction in question prevents the jury from an undiluted and unfettered consideration of the federally-mandated FELA liability standards.

The submission of the "unavoidable accident" instruction did just that. The instruction was unfairly harmful to Petitioner Garcia because it diverted the jury's attention away from the Respondents' conduct and directed the jury to focus its attention instead on the avoidance of the Respondents' liability altogether. It was an extraneous instruction which tended improperly to influence the jury to accept Respondents' argument that they were not negligent. It poisoned the jury's evaluation of *the entire liability question* and was therefore reversible error as a matter of federal substantive law.[10]

It cannot be "harmless error" when an improper instruction prevents a fair and proper consideration of the essential liability issues in an FELA case.[11] Obviously,

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[10] Notably, the commentary in the Texas Pattern Jury Charges relating to "unavoidable accident" specifically suggests that the inclusion of an unavoidable-accident instruction should be treated as an "impermissible form of nudging" even under Texas law in *any* case submitted – as the present case was – under the broad form of liability questions. See 1 *State Bar of Texas, Pattern Jury Charges*, PJC 3.04.

[11] The instruction should have been considered reversible error even under the previous Texas decisions regarding broad-form submissions which the Beaumont court cited in its opinion.

For instance, in *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749-50 (Tex. 1980), the Texas Supreme Court held that it need not address the plaintiff Bailey's complaints about the

one can speculate that the jury in the present case *might* have believed that there was no negligence on the part of

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submission of certain defensive issues because the jury had specifically found that the defendant's product was not defective and the defensive issues were therefore immaterial. Similarly, in *Burnett v. File*, 552 S.W.2d 955, 958 (Tex.Civ.App. – Waco 1977, writ ref'd n.r.e.), the court of appeals held that the trial court was within its discretion in expressly conditioning all other jury questions on a finding of "injury" in the first question. The jury found no injury, so no other questions were answered. To the same effect, in *Tate v. Sharp*, 831 S.W.2d 899, 900 (Tex.App. – Beaumont 1992, no writ), the Beaumont court of appeals properly held that the submission of an incorrectly-worded instruction on "unavoidable accident" was not reversible error because the jury expressly found that the plaintiff suffered "0" damages.

The situation in the present case, however, was very different. Here, the jury never reached the damages question at all because it was conditioned on a "yes" answer to question No. 1, the sole liability question. Question No. 1 was a global inquiry encompassing (a) the Respondents' alleged negligence, (b) causation of the occurrence in question, *and* (c) the extent of injury, if any, to Petitioner Garcia. None of these various elements of the broad-form liability question was submitted separately, so we do not and *cannot* know on what basis the jury answered "no" as to any of the Defendants. The unwarranted submission of an instruction on "unavoidable accident" was harmful for *precisely that reason:* It infected the jury's entire consideration of the sole, global liability question. Compare *First International Bank in San Antonio v. Roper*, 686 S.W.2d 602, 603-4 (Tex. 1985) (erroneous submission of instruction on "sole cause" at the urging of defendant lawn-mower manufacturer "poisoned the jury verdict" because it was submitted prior to *all* of the jury questions. *Id.* at 603). See also *Lemos v. Montez*, 680 S.W.2d 798, 799-801 (Tex. 1984) (submission of "neither," which the jury found, as an alternative to inquiry about the plaintiff's and defendant's negligence, was improper submission of unsupported "unavoidable accident" theory); *Hukill v. H.E.B. Food Stores, Inc.*, 756 S.W.2d 840 (Tex. App. – Corpus Christi 1988, no writ) (unsupported submission of "unavoidable accident"

the defendants, or *might* have believed that the negligence of the defendants was not a cause of Petitioner's injuries in the plane crash, or *might* have believed that Petitioner was not as seriously injured in the crash as he contended. But Petitioner was entitled to have *all* of those hotly-contested fact issues considered under a correct set of instructions on the special governing FELA law established by Congress!

The trial court prevented a fair determination of all of the fact issues by mistakenly injecting the unsupported theory of "unavoidable accident" into the jury's consideration. Under the court's instructions, and in light of the jury's "no" finding on liability as to *all* the Defendants, it appears highly likely that the jury was misled to conclude the plane crash was an *"unavoidable accident"* – a *legally*-impermissible conclusion in an FELA negligence case.

This Court should reverse the judgments of the Texas courts and grant Petitioner a new trial.

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instruction "give[s] the jury an attractive alternative to the difficult determination of negligence . . . and as such constitutes an unconscious or hidden rebuttal to the essential issues to be determined, because it directs the jury away from the real issues submitted and the burden imposed by law of proof by the parties." *Id.* at 844).

II. REVIEW SHOULD BE GRANTED BECAUSE AS A MATTER OF LAW THE RESPONDENT RAILROAD AND THE OTHER RESPONDENTS INVOLVED IN THE FOR-PROFIT TRANSPORTATION OF PETITIONER AND OTHER RAILROAD WORKERS BY AIRCRAFT WERE NEGLIGENT PER SE IN CONDUCTING AN UNAUTHORIZED COMMERCIAL AIRCRAFT OPERATION IN VIOLATION OF PART 135 OF THE FEDERAL AVIATION REGULATIONS.

The negligence and causation issues encompassed in Question One submitted to the jury were unnecessary and improperly submitted in light of the conclusive evidence that the commercial flight operations undertaken by Respondents, and specifically the flight in question, were in direct violation of Federal Aviation Regulations (FAR) Part 135.

Plaintiff specifically objected to the submission of Question One to the jury because the violation of FAR Part 135 constituted negligence per se on the part of Respondents, and as a matter of law such negligence was a proximate cause – or at the very least a cause in whole or in part – of the airplane accident.[12]

FAR Part 135 is a comprehensive, detailed set of rules, regulations, and specifications applicable to "air taxi operations" and "[t]he carriage in air commerce of

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[12] The trial court submitted two different standards of causation as to each Respondent in Question One. The jury was asked to find whether each Defendant's conduct as negligent, and also whether such negligence was either a "proximate cause" or a "cause in whole or in part" of the occurrence in question. The latter standard, correctly defined as meaning "a cause which played any part, no matter how small, in producing the [plaintiff's] injury," is the proper standard of causation applicable to an FELA case. See, e.g., *Mitchell v. Missouri-Kansas-Texas Railroad Co.*, 786 S.W.2d 659-61 (Tex. 1990).

persons or property for compensation or hire as a commercial operator (not an air carrier) in aircraft having a maximum seating capacity of less than 20 passengers or a maximum payload capacity of less than 6,000 pounds." See § 135.1.

FAR § 135.5 contains the most essential provision in Part 135; it is also directly material to the present case. Section 135.5 states:

> No person may operate an aircraft under this Part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part. . . .

FAR Part 135 unquestionably applied to the Southern Pacific "deadheading" flight operations conducted by Mike Warren and Jackie Holmes, d/b/a S.W. Air Leasing, for compensation. Holmes admitted that his contract with Southern Pacific for the flights in the Piper Lance airplane was a commercial operation intended to generate a profit. Further, both Holmes and pilot Warren Luttrell admitted that they were familiar with FAR Part 135 at the time. Although they claimed at trial that they did not think that Part 135 applied to their operation, they provided no legal reason for such alleged belief.

The Federal Aviation Administration (FAA), which investigated the accident, determined that **Luttrell was flying in violation of the provisions of FAR Part 135,** and the FAA suspended his license for 60 days as a result of the violation. Luttrell did not even contest the suspension. The FAA's order temporarily revoking Luttrell's license stated in part as follows:

> On or about August 2, 1988, you acted as pilot in command of Civil Aircraft N6486C, a Piper Model PA-32, the property of another, on a flight in air transportation carrying passengers for compensation and hire.

> The above-described flight ended in an accident while on approach to El Paso International Airport, El Paso, Texas, injuring passengers.
> At all times mentioned herein you did not hold an air taxi-commercial operator (ATCO) operating certificate and appropriate operations specifications.
> By reason of the foregoing, you violated Section 135.5 of the Federal Aviation Regulations, in that no person may operate an aircraft under Part 135 of the Federal Aviation Regulations without, or in violation of an air carrier operating certificate and operations specifications issued under Part 135 of the Federal Aviation Regulations.

Luttrell admitted at trial that neither he nor any other pilot with Gene's Flight Club of El Paso, Inc. was certified to operate an aircraft in a Part 135 operation. It was undisputed that none of the other Defendants on whose behalf Luttrell was flying – Jackie Holmes, S.W. Air Leasing, Mike Warren, or Southern Pacific – had either sought or obtained Part 135 certification for the deadhead operations and other flights in which they were using Holmes's Piper Lance airplane.

As a matter of law, the Defendants' violation of Part 135, and especially Section 135.5, was a cause in whole or in part of the occurrence in question. If Defendants had abided by the regulations and not engaged in such flights for compensation and hire when they were not certified to do so, the flight in question would never have occurred and the accident obviously would not have happened.

Under Texas law, the violation of a legislative enactment or administrative regulation establishes negligence per se if the statute or regulation "is designed to prevent an injury to that class of persons to which the injured party belongs." *El Chico Corp. v. Poole*, 732 S.W.2d 306, 312 (Tex. 1987); *Nixon v. Mr. Property Management Co., Inc.*, 690

S.W.2d 546, 549 (Tex. 1985); *Carter v. William Sommerville and Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979); *Southern Pacific Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973) (citing Restatement (2nd) of Torts § 288B); *Continental Oil Co. v. Simpson*, 604 S.W.2d 530, 534 (Tex.Civ.App. – Amarillo 1980, writ ref'd n.r.e.). Obviously, the purpose of the Part 135 regulations governing the transportation of persons for compensation or hire is to protect the safety of the passengers on such commercial charter flights, which include Nick Garcia and the other railroad workers on the "deadhead" flight in question.

Apparently no Texas court has ruled on whether the violation of a Federal Aviation Regulation establishes negligence per se. But a number of other state and federal courts have addressed this issue. The Fifth Circuit has held, as have several other federal appellate courts, that the FARs have the force and effect of law. *Transco Leasing Corp. v. United States*, 896 F.2d 1435, 1446, (5th Cir. 1990), *rehearing denied in part and granted in part on other grounds*, 905 F.2d 61 (5th Cir. 1990); *In Re N-500-L Cases*, 691 F.2d 15, 28 (1st Cir. 1982); *Rodriguez v. United States*, 823 F.2d 735 (3rd Cir. 1987).

The Fifth Circuit has not directly held that the violation of a Federal Aviation Regulation is negligence per se, though it has discussed the issue in at least two cases, *Hayes, v. United States*, 899 F.2d 438, 443-4 (5th Cir. 1990), and *Swoboda v. United States*, 662 F.2d 326, 329 (5th Cir. 1981), *rehearing denied*, 668 F.2d 532 (5th Cir. 1982), *cert. denied*, 457 U.S. 1134 (1982). However, the court in both *Hayes* and *Swoboda* found other grounds on which to base its decisions.

Other courts have held that the violation of an FAR is negligence per se. In *In Re N-500-L Cases*, 691 F.2d 15, 28 (1st Cir. 1982), the First Circuit said:

> The Federal Aviation Administration (FAA) has promulgated regulations (FARs) that govern,

> inter alia, the operation of airplanes by pilots. Pilot's "rules of the road" are found in Part 91 of title 14 of the Code of Federal Regulations, with additional rules for air taxi operations, such as N-500-L in this instance, located in Part 135. ***These regulations have the force and effect of law,*** [citations omitted], . . . ***and their violation is negligence per se.***

691 F.2d at 28. (emphasis added) See also *Gatenby v. Altoona Aviation Corp.*, 407 F.2d 443 (3rd Cir. 1968) (holding that it was negligence per se for single-engine charter pilot to fly into adverse weather conditions and proceed toward airport despite warnings of low visibility, in violation of FAA's visual flight regulations).

Petitioner Garcia met his burden as the Plaintiff at trial by undisputedly and conclusively establishing that there was a failure by each and all of the Respondents to comply with FAR Part 135, and that but for Respondents' conduct of the unlawful commercial flight operation, this accident and Petitioner Garcia's injury would never have happened.

An aeronautics expert, Norman Horton, called as an expert witness by Petitioner, testified that Part 135 applied to all of the Respondents, since they were all engaged in the commercial flight operation, and that they absolutely were in violation of numerous provisions of the Part 135 regulations. There was no competent evidence to the contrary.

However, even if a strained interpretation concludes that the violation of FAR Part 135 did not constitute negligence per se as to all of the Respondents, it plainly did as to the pilot, Respondent Luttrell, because the FAA specifically cited him and suspended his license for the violation. Luttrell's negligence is attributed as a matter of law to Defendant Southern Pacific, because as a matter of law Luttrell was an agent of Southern Pacific under the FELA.

In *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958), this Court expressly held that "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of FELA." *Id.* at 332. *Sinkler* was a case arising in Texas in which the railroad contended that an injury to one of its employees caused by the negligence of an independent contractor could not be attributed to the railroad under the FELA. The Supreme Court rejected that argument and held that the negligent performance of any operational activity being performed on behalf of a railroad, even by an independent contractor, subjects the railroad to liability for any resulting injury to any of its employees. The Court specifically noted that "in interpreting the FELA, we need not depend upon common-law principles of liability." *Id.* at 329. Petitioner objected to the submission of the liability issues in Question One on the grounds that the Defendants' liability was established as a matter of law by virtue of their negligence per se in violating FAR Part 135. (Supp. SF 5-8)

The trial court committed reversible error in submitting Question One to the jury and in refusing to hold as a matter of law that the Respondents were negligent and that such negligence was a cause in whole or in part of Petitioner's injury. The appellate courts of Texas erred in failing to correct this deprivation of justice to Petitioner.

The judgments below should be reversed and this cause should be remanded for a new trial.

CONCLUSION

Petitioner Nick Garcia did not have the legally proper trial to which he was entitled by federal statute, nor was there a fair submission of his FELA claims against Southern Pacific and the other Respondents, of whom all were engaged in the charter flight operation under contract with Southern Pacific.

Ignoring the impact of substantive federal law on its review of the jury charge, the Texas court of appeals mistakenly interpreted the improper "unavoidable accident instruction" as "harmless error." In the context of this FELA injury claim, however, such a substantive error cannot be considered harmless.

Petitioner is entitled to a new trial under the proper federal standards and instructions applicable to FELA cases.

WHEREFORE, Petitioner Nick Garcia respectfully prays that the Supreme Court grant his Petition for Writ of Certiorari; that the Court reverse the judgments of the

Texas courts below; and that the Court direct the remand of this cause for a new trial.

Respectfully submitted,

PAUL E. KNISELY
Counsel of Record

BROADUS A. SPIVEY
SPIVEY, GRIGG, KELLY & KNISELY
P.O. Box 2011
Austin, TX 78768
512/474-6061
(telecopier 512/474-1605)

GILBERT I. LOW
ORGAIN, BELL & TUCKER
470 Orleans St.
Beaumont, TX 77701
409/838-6412
(telecopier 409/838-6959)

Attorneys for Petitioner
Nick Garcia

Appendix A

In The

Court of Appeals

Ninth District of Texas at Beaumont

No. 09-91-284-CV

NICK GARCIA, Appellant

V.

SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, WARREN LUTTRELL, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellees

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On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-136,293

OPINION

This is the appeal of a take-nothing judgment in a jury trial of a suit for negligence at common law and under the Federal Employers' Liability Act (FELA). Nick Garcia was one of several employees of Southern Pacific Transportation Company being flown by airplane from Tucumcari, New Mexico to El Paso, Texas. Garcia alleged he received injuries during landing because the plane encountered a wind shear created by thunderstorm. Garcia raises four points of error on appeal, to-wit:

Point of error one: The trial court erred in submitting an instruction to the jury on "unavoidable accident," because there was no evidence of an unavoidable accident in this case and as a matter of law an instruction on unavoidable accident is improper in an FELA case.

Point of error two: The trail court erred in submitting Question One to the jury concerning the Defendants' negligence and causation of the occurrence in question, because the evidence conclusively established that all of the Defendants were negligent per se in conducting an unauthorized commercial aircraft operation for compensation or hire in violation of Part 135 of the Federal Aviation Regulations, and that such violation was a proximate cause and/or a cause in whole or in part of the occurrence in question.

Point of error three: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Warren Luttrell because the jury's "no" answer to Question One(b), concerning whether the conduct of Warren Luttrell was negligent and a cause in whole or in part of the occurrence in question, is contrary to the overwhelming weight of the evidence.

Point of error four: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Southern Pacific Transportation Company because as a matter of law Warren Luttrell was acting as an agent of Southern Pacific on the occasion in question.

Question One was a global submission of all elements of the cause of action under common-law negligence and FELA as to all defendants, as follows:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, *and injury, if any*[1], to Nick Garcia:

Answer "Yes" or "No" to each of the following:

Answer "Yes" or "No"

	Proximate Cause	Cause in whole or in part
a. Jackie Holmes	No	No (10-2)
b. Warren Luttrell	No	No (10-2)
c. Gene's Flight Club of El Paso, Inc.	No	No (unam.)
d. Mike Warren	No	No (unam.)
e. Southern Pacific	No	No (unam.)

All of Garcia's points of error either challenge the charge given on the negligence and causation issues, or the sufficiency of the evidence to support the jury's finding on the negligence and causation issues. None of the points of error, or the arguments under the points of error, urge that the jury finding of no injury is against the overwhelming weight and preponderance of the evidence, or that injury was established as a matter of law. Garcia did not seek medical attention for two weeks after the incident, although he has since received treatment for a back injury. Injury was an issue at trial, but even if it was not, injury was included within Question One. The jury could have determined that, although all of the defendants were negligent and their negligence caused

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[1] Emphasis added.

the occurrence, Garcia received no injury. Such a finding would result in the answer given by the jury in this case and the take nothing judgment would then be proper unless appellant successfully challenged the "no injury" finding on appeal.

Modern jury charge practice normally combines the injury issue with the damages question. Although the "Van Zandt"[2] issue is not utilized in modern jury charge practice, the issue here is one of appellate procedure rather than charge procedure. Error in the submission of an issue is harmless when the findings of the jury in answer to other issues are sufficient to support the judgment. *Boatland of Houston, Inc. v. Bailey,* 609 S.W.2d 743, 749 (Tex. 1980); *Texas Const. Service Co. of Austin v. Allen,* 635 S.W.2d 810, 814 (Tex. App. – Corpus Christi 1982, writ ref'd n.r.e.). It is appropriate to submit a global charge to the jury, but to then obtain a reversal of the judgment entered on the jury's verdict, the appealing party must attack each and every ground upon which the verdict might have been rendered. The omission of any possible ground upon which the judgment might have been rendered compels the appellate court to affirm the judgment as it finds support in grounds not raised as error on

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[2] Under the former special issue practice, when the existence of an injury was controverted it was not a sufficient submission of that ultimate fact issue, over objection, to inquire whether a particular negligence act was a proximate cause of plaintiff's injuries, if any, or what amount of money will compensate the plaintiff for the injuries, if any, sustained as a proximate result of the defendant's negligence, if any. *Texas & Pacific Railway Company v. Van Zandt,* 159 Tex. 178, 317 S.W.2d 528 (1958).

appeal. When the jury fails to find that the plaintiff has been injured, all other issues become immaterial. *Burnett v. File*, 552 S.W.2d 955, 958 (Tex. Civ. App. – Waco 1977, writ ref'd n.r.e.). This is similar to the situation which arises when the jury finds negligence but fails to find damages; the plaintiff must challenge both findings to obtain reversal on appeal. *Tate v. Sharp*, 831 S.W.2d 899, 900 (Tex. App. – Beaumont 1992, no writ). Assuming we find error in each of the points of error, we cannot find that the trial court erred in entering the take-nothing judgment because appellant does not challenge the implied finding that he failed to prove injury by a preponderance of the evidence.

We are not authorized to reverse the judgment of the trial court unless the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. TEX. R. APP. P. 81(b)(1). The broad form jury question combined negligence, proximate cause and injury. If negligence and proximate cause were found by the jury, but no injury, the jury would have answered "no" to all defendants, as it did. Assuming without deciding that such a "no injury" finding would be against the overwhelming weight and preponderance of the evidence, appellant does not challenge such a finding by point of error. Therefore, there is a theory submitted to the jury which supports the take-nothing judgment regardless of the merit of appellant's points of error.

Points of error one through four are overruled. The judgment is affirmed.

AFFIRMED.

PER CURIAM

Opinion Delivered
December 3, 1992
Do Not Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

Appendix B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

April 14, 1993

Mr. Paul E. Knisely
Spivey, Grigg, Kelly
& Knisely
P.O. Box 2011
Austin, TX 78768

Mr. Gilbert I. Low
Orgain, Bell & Tucker
470 Orleans Street
Beaumont, TX 77701

Mr. Michael R. McGown
Weller & Green
P.O. Box 350
Beaumont, TX 77704-0350

Ms. Beth Lazen
Mehaffy & Webber
P.O. Box 16
Beaumont, TX 77704

Mr. Mike Warren
1309 Hookridge Drive
El Paso, TX 79925

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly
& Knisely
P.O. Box 2011
111 West Sixth Street,
Suite 300
Austin, TX 78768-2011

Mr. Edward C. Hughes
1231 Wyoming
El Paso, TX 79903

Mr. Daniel V. Flatten
Mehaffy & Weber
P.O. Box 16
Beaumont, TX 77704

Mr. Dewey J. Gonsoulin
Mehaffy & Weber
P.O. Box 16
Beaumont, TX 77704

RE: Case No. D-3407

Style: NICK GARCIA v. SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, WARREN LUTTRELL, and SOUTHERN PACIFIC TRANSPORTATION COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

John T. Adams, Clerk

by /s/ Courtland Crocker
Courtland Crocker
Deputy

Supreme Court, U.S.
FILED
OCT - 1 1993
OFFICE OF THE CLERK

No. 93-334

In The

Supreme Court of the United States

October Term, 1993

NICK GARCIA,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, and WARREN LUTTRELL,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Judicial District Of Texas

BRIEF FOR SOUTHERN PACIFIC TRANSPORTATION COMPANY IN OPPOSITION

DEWEY J. GONSOULIN
Counsel of Record
DANIEL V. FLATTEN
ELIZABETH C. LAZENBY
MEHAFFY & WEBER
2615 Calder
P. O. Box 16
Beaumont, Texas 77704
(409) 835-5011

Attorneys for Respondent, Southern Pacific Transportation Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state courts below committed reversible error in instructing the jury on unavoidable accident in a case involving both common law defendants and a railroad carrier under the Federal Employers' Liability Act (FELA) where the Petitioner failed to timely and properly object to such instruction and there was sufficient evidence to support the submission of such jury instruction.

2. Whether the state courts below committed reversible error in submitting Question No. 1 to the jury concerning the defendants' negligence and causation of the occurrence in question since a violation of Part 135 of the Federal Aviation Regulations is not negligence per se and could neither have been a proximate cause nor cause in whole or in part of the occurrence in question.

LIST OF ALL PARTIES TO PROCEEDING

PETITIONER:

NICK GARCIA

RESPONDENTS:

SOUTHERN PACIFIC TRANSPORTATION COMPANY
JACKIE HOLMES
MIKE WARREN
SOUTHWEST AIR LEASING
GENE'S FLIGHT CLUB OF EL PASO
WARREN LUTTRELL

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No. 93-334

In The

Supreme Court of the United States

October Term, 1993

NICK GARCIA,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, and WARREN LUTTRELL,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Judicial District Of Texas

BRIEF FOR SOUTHERN PACIFIC TRANSPORTATION COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Ninth Court of Appeals of the State of Texas is unpublished but a copy of such opinion is found in the appendix to this brief.

JURISDICTION

The judgment of the Ninth Court of Appeals for the State of Texas was entered on December 3, 1992. After a petition for rehearing was denied on January 7, 1993, the Petitioner filed an Application for Writ of Error in the Texas Supreme Court on February 19, 1993. The Texas Supreme Court entered an order on April 14, 1993 denying the Petitioner's Application for Writ of Error. The petition for a writ of certiorari was received by Respondent on September 1, 1993. Petitioner alleges jurisdiction of this court is invoked under 28 U.S.C. Section 1257.

Considerations Governing Review On Writ of Certiorari Are Not Met

Despite the provisions of Rule 10, *Rules of The Supreme Court*, Petitioner makes no showing that the Texas Supreme Court in this case has either decided:

(a) a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

(b) an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Thus, Petitioner's petition should be denied.

STATEMENT OF THE CASE

This is a suit by the Petitioner, Nick Garcia, seeking to recover actual and punitive damages arising out of an airplane incident that occurred at El Paso, Texas on August 2, 1988. The Petitioner, an employee of Southern Pacific Transportation Company, was riding in an airplane owned by Jackie Holmes and piloted by Warren Luttrell when it made a hard landing as it made its approach to the El Paso, Texas International Airport. The Petitioner sued Jackie Holmes, individually and doing business as Southwest Air Leasing, the owner of the airplane; Warren Luttrell, the pilot of the plane; Southern Pacific Transportation Company, the Petitioner's employer who had contracted with Southwest Aviation, Inc. to transport its employees when they were being "deadheaded" back to their duty station; Mike Warren, the former owner of the airplane; and Gene's Flight Club of El Paso, which supplied the pilot.

The case was submitted to the jury based on common law negligence and negligence under the Federal Employers' Liability Act (FELA). The jury acquitted all of the defendants of any negligence, whether a proximate cause or a cause in whole or in part of the occurrence in question. The trial court entered judgment for the defendants based upon the jury verdict. The Petitioner appealed the judgment to the Ninth Court of Appeals at Beaumont, which affirmed the judgment of the trial court. The Petitioner then filed his application for writ of error in the Texas Supreme Court which denied his application. The Petitioner has now filed a petition for writ of certiorari.

Petitioner's Misstatements or Omissions of Fact and Law

Pursuant to Rule 15, *Rules of the Supreme Court*, Respondent Southern Pacific addresses the following perceived misstatements or omissions contained in Petitioner's Petition for Writ of Certiorari:

A. FACTS:

1. Petitioner's contention that he had a "serious and permanent lower back injury as a result of the crash" was hotly disputed. Immediately after the incident, the pilot asked all passengers if anyone was hurt and all of them responded in the negative. Petitioner did not see Dr. Biegonowski, who appeared at trial, until two weeks after the incident. Dr. Earl Rafes examined Petitioner and formed a clinical impression that he did not have any neurological abnormality nor orthopedic deficit. Dr. Rafes had an MRI performed on Petitioner, and that procedure confirmed Dr. Rafes' opinion because it was an essentially normal study.[1]

2. Contrary to Rule 24.6, Rules of the Supreme Court, Petitioner includes irrelevant and immaterial information in footnote 9 of his Petition by stating that other passengers settled their claims. Such information is totally outside the record of this case and serves only to prejudice Respondent.

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[1] Thus, the jury may have determined that Plaintiff suffered no injury. If so, under the broad form submission of Question No. One (see footnote No. 2), the jury would have answered "No" to all of its subparts, just as it actually did.

3. Petitioner's description of the plane's landing omits several important undisputed matters: the airport was not closed at the time of the landing; other planes were landing and taking off at the time of the landing; pilot Luttrell received Instrument Flight Rules (IFR) clearance to land, but because he could actually see the runway at the time of landing went in on a visual approach; the Federal Aviation Administration (FAA) did not find Mr. Luttrell negligent for flying into a thunderstorm or for landing the plane in a thunderstorm or for flying Visual Flight Rules (VFR) as opposed to IFR; the FAA described the occurrence in question as an "incident" not an "accident" and found there was a "hard landing" not a "crash". Further, Mr. Luttrell's undisputed testimony was that the plane's emergency landing transponder was activated when the plane's nose wheel collapsed *after* the landing, not on the landing itself.

4. As to contractual arrangements for charter flights, Southern Pacific thought it was contracting with Southwest Aviation, Inc., a long time charter operator in the El Paso area, to fly its employees. An uncontested summary judgment was entered on behalf of Southwest Aviation as it was determined that Defendant Mike Warren falsely represented himself as being authorized by Southwest Aviation, Inc. to contract on its behalf with Southern Pacific. Neither the records nor facts developed at trial showed that Southern Pacific was aware that it was contracting with any entity other than Southwest Aviation, Inc.

B. LAW:

1. Despite Petitioner's suggestion to the contrary, an unavoidable accident instruction is permissible under Texas law when raised by the evidence, as was recently explained by the Texas Supreme Court in *Hill v. Winn Dixie Texas, Inc.*, 849 S.W.2d 802 (Tex. 1992).

REASONS FOR DENYING THE WRIT

I. The Writ Should be Denied Because the Courts Below Committed No Reversible Error in Instructing the Jury on Unavoidable Accident in a Case Involving Both Common Law Defendants and a Railroad Carrier Sued Under the FELA Where the Petitioner Failed to Timely and Properly Object to Such Instruction and There Was Sufficient Evidence to Support Its Submission.

A. WAIVER: Petitioner Failed To Object Timely and Properly That An Unavoidable Accident Instruction Is Improper in an FELA Case.

Texas procedural law is clear that a party must specifically object to defects in the charge to avoid waiver. Tex. R. Civ. P. 274. Petitioner failed to observe this Rule. At no time prior to submission of the case to the jury did Petitioner properly object that an instruction on unavoidable accident is improper as a matter of law in an FELA case, the point he now raises on appeal. Petitioner thus waived any error on those grounds. *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986).

Texas Rule of Civil Procedure 274 provides:

> "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. *Any complaint as to a* question, *definition, or instruction,* on account of any defect, omission, or fault in pleading, *is waived unless specifically included in the objections . . .* " (emphasis supplied).

Rule 274's purpose is to allow trial courts "to correct errors in the charge, by requiring objections both to clearly designate the error and to explain the grounds for the complaint." *Castleberry,* 721 S.W.2d at 276. (citing other cases: *Brown v. American Transfer & Storage,* 601 S.W.2d 931, 938 (Tex. 1980); *Davis v. Campbell,* 572 S.W.2d 660, 663 (Tex. 1978)). It is not sufficient that objection was made on other grounds. *Davis,* 572 S.W.2d at 663.

Petitioner does not and cannot contend that he properly objected at trial to the unavoidable accident instruction on the grounds that this was an FELA case, though he presents argument as if he had so objected. Petitioner's sole objection at trial to the unavoidable accident instruction was that Warren Luttrell's negligence was established as a matter of law. Now Petitioner seeks to raise new objections on appeal and that, he cannot do. Texas law is well settled that Petitioner may not raise new objections on appeal. *Lakeway Land Co. v. Kizer,* 796 S.W.2d 820 (Tex.App. – Austin 1990, writ denied); *Texaco, Inc. v. Pennzoil, Co.,* 729 S.W.2d 768, 819-20 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed* 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988).

> "With regard to the first instruction, appellant failed to properly preserve his complaint for

> appellate review. *We note that a party is confined to the jury-instruction objection made at trial; any variant complaint on appeal is waived.* (citing other cases) . . . " (emphasis supplied). *Lakeway*, 796 S.W.2d 820, 825.

Thus, Petitioner waived his objection that an unavoidable accident instruction is impermissible in an FELA case by failing to make it at trial. However, even if Petitioner had so objected, the instruction would have been proper because of the presence of common law defendants.

B. COMMON LAW DEFENDANTS

This lawsuit, by Petitioner's own design, is not a pure FELA case. Rather it is one that combines common law and FELA causes of action and parties. Defendant Southern Pacific was sued for negligence under FELA, but Petitioner also alleged common law negligence against defendants Holmes, Luttrell, Gene's Flight Club, and Warren, and sought findings of gross negligence against each as well as recovery of exemplary damages. The common law defendants, thus, were entitled to have the jury apply instructions appropriate for a common law negligence suit to the common law causation standard, proximate cause, even if the causes of action alleged against them were made in a suit involving an FELA defendant.

An "unavoidable accident" instruction is proper in an FELA case that includes common law defendants, when the instruction is raised by the evidence. *Smith v. Illinois Central R.R. Co.*, 486 F.2d 943, 945 (5th Cir. 1973).

The instant case meets the *Smith* standard. It involves common law defendants and, as discussed below, the instruction was raised by the evidence. Moreover, Petitioner never abandoned his common law actions, but rather pursued them vigorously. In addition to the common law negligence submission of Question One, the Petitioner also obtained an issue on gross negligence against the common law defendants, and sought exemplary damages which may not be recovered against an FELA defendant. *Kozar v. Chesapeake and Ohio Railway Co.*, 449 F.2d 1238, 1240 (6th Cir. 1971). Accordingly, the common law defendants sought, and were entitled to, an "unavoidable accident" instruction.

To support his theory that an unavoidable accident instruction was inappropriate, Petitioner relies on two Fifth Circuit opinions: *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), and *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966). Petitioner, however, fails to appreciate the fundamental difference between *Page* and *Mills*, on one hand, and this case, on the other: neither *Page* nor *Mills* involved common law causes of action or defendants; this case does. As the Fifth Circuit recognized in *Smith, supra*, (decided subsequent to *Page* [1965] and *Mills* [1966]), the presence of common law defendants in an otherwise FELA case requires different standards. Thus, in *Smith* the use of an "unavoidable accident" instruction in an FELA case that involved common law defendants was approved, as there was evidence to support the instruction. *Smith*, 486 F.2d at 945. The sufficiency of evidence in the instant case is discussed below in subsection C.

In addition, Petitioner was not harmed by the unavoidable accident instruction because the jury was precluded from applying it to the FELA causation standard. The jury considered the appropriate causation standard for both the common law negligence causes of action and the FELA cause of action. The causation standards for both types of negligence (proximate cause for common law negligence and cause in whole or in part for FELA negligence) were presented in Question One of the charge.[2] Question One was so structured in combination

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[2] QUESTION NO. 1, as presented and answered, is as follows:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, and injury, if any, to Nick Garcia:

Answer "Yes" or "No" to each of the following:

	Answer "Yes" or "No"	
	Proximate Cause	Cause in Whole or in Part
a. Jackie Holmes	No	No
b. Warren Luttrell	No	No
c. Gene's Flight Club of El Paso, Inc.	No	No
d. Mike Warren	No	No
e. Southern Pacific	No	No

with the instructions[3] that the jury could not apply the FELA standard to the common law causes of action or vice versa without disregarding the court's instructions. Question One presented both causation standards, proximate cause and cause in whole or in part, as to each defendant, separately and distinctly. However, the jury was specifically told they could use the definition "unavoidable accident" only in determining proximate cause. By virtue of the definitions themselves, "unavoidable accident" was restricted to events "not *proximately caused* by the negligence of any party to it" (emphasis supplied). The trial court's instruction regarding definitions was as follows:

> 7. When words are used in this charge in a sense which varies from the meaning commonly

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[3] Three definitions provided in the Court's charge aided in establishing this structure:

* * *

> 4. "Cause In Whole or In Part" means a cause which played any part, no matter how small, in producing the injury for which damages are sought.
> 5. "Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of an event.

* * *

> 9. "Unavoidable Accident" means an occurrence may be an "unavoidable accident", that is, an event not *proximately* caused by the negligence of any party to it (emphasis supplied).

> understood, you will be given a proper legal definition, which you are bound to accept in place of any other meaning.

The jury, thus, was required to accept the definition of the FELA standard, "cause in whole or in part" just as it was given in the charge, and could not apply "unavoidable accident" to the FELA standard without disregarding the court's instruction. Under Texas law, an appellate court must assume that a jury properly followed the trial court's instructions. *Turner, Collie & Braden v. Brookhollow, Inc.*, 642 S.W.2d 160, 167 (Tex. 1982); *Times Herald Printing Co. v. A. H. Belo Corp.*, 820 S.W.2d 206, 213 (Tex. App. – Houston [14th Dist.] 1991, no writ history). Therefore, it must be assumed that the jury applied "unavoidable accident" only to the proximate cause standard of Question One, and not to the FELA standard. Petitioner, thus, suffered no injury because the unavoidable accident instruction is appropriate for common law causes of action where it is raised by the evidence.

C. SUFFICIENCY OF EVIDENCE

The common law defendants were entitled to an instruction on unavoidable accident because there was sufficient evidence to support it under Texas law.

An unavoidable accident instruction is appropriate in several circumstances. An unavoidable accident is present when an event occurs which was not proximately caused by the negligence of any party to the event. *Yarborough v. Berner*, 467 S.W.2d 188, 191 (Tex 1971); *Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379, 385 (1952). Physical conditions or circumstances

("non-human" ones) can result in unavoidable accidents. *Yarborough*, at 191. The Texas Supreme Court recently stated that the instruction is ordinarily given in cases involving "environmental conditions such as fog, snow, sleet, wet or slick pavement, or obstruction of the view." *Hill v. Winn-Dixie Texas, Inc.*, 849 S.W.2d 802, 803 (Tex. 1992); *see, Yarborough* at 191. Environmental or weather conditions have often merited an unavoidable accident instruction. In *Blasberg v. Cockerell*, 254 S.W.2d 1012, 1014-15 (Tex. Civ. App. – Amarillo, 1952, writ refused n.r.e.), the court determined that unavoidable accident was raised by evidence regarding the rainy weather and slick pavement. Slick pavement on a rainy day is no less foreseeable than wind shears or currents in the vicinity of thunderstorms.

The instant case, too, involves non-human, environmental conditions or weather factors, i.e., a thunderstorm, with accompanying wind currents, and contains ample evidence of unavoidable accident.[4] Pilot Luttrell

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[4] Petitioner argues that there was "no evidence" to support an unavoidable accident instruction. However, the long accepted standard for determining a "no evidence" point under Texas law was recently articulated by the Texas Supreme Court in *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670 (Tex. 1990):

> " . . . In determining a 'no evidence' question, however, a court *must consider only that evidence and reasonable inferences therefrom that tend to support the jury findings*, disregarding all contrary evidence and inferences. *King v. Bauer*, 688 S.W.2d 845 (Tex. 1985) . . . " 786 S.W.2d 670, 671. (emphasis supplied)

Using the *Best* standard, one considers only the evidence and the reasonable inferences therefrom which support the trial court's instruction on unavoidable accident, and disregards all

testified that the flight to El Paso was smooth or better than average; that when he first contacted the tower he was advised that there was a thunderstorm in the vicinity of the airport and possible wind shear; that a wind shear advisory is not unusual for that time of year in El Paso but it is there daily in the afternoon; that he had flown in and out of the El Paso Airport for 25 years and that in the afternoon for three months of the year from June through September wind shear advisories are heard almost daily on the AIDEIS radio; that the radar turned him over to the tower when he was probably 8 or 10 miles from the runway; that he could see the thunderstorm at that time in the distance; that he could also see the airport at that time; that as he was turned over to the tower he could visually see the beginning of the runway with his naked eye; that the thunderstorm was not at his end of the runway because it had apparently already passed over it; that it was an isolated thundercell maybe one mile in diameter; *that he did not fly into the thunderstorm*; that he did not land on instruments that day because he was looking at the runway all the time visually; that it is better and safer to land visually than on instruments if one can see where one is going; that at that time he had the airport in sight and advised the tower that he was going to land visually and they cleared him to land; that there were planes landing before him and planes landing after him that day; that one airplane was waiting to take off at the time he was landing; that he was descending to

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evidence and inferences to the contrary. There was indeed ample evidence to support the trial court's instruction in this case.

the end of the runway; that he made a correction because of a wind shift in order to hold the alignment with the runway, and he made a couple of small adjustments there as the wind works on the aircraft, which is not unusual; that he was in control of the aircraft; that he was still on his descent and because of the possible wind shear he increased his normal air speed to have a safety advantage; that he increased his speed from 90 to 100 to 105 knots; that as he was approaching to make his final touchdown he had a sudden downshift which might have been a wind shear when he was 10 feet above the runway; that the aircraft settled down to the runway a little faster than he wanted and it did not glide as far through that 10 feet as it normally would have; that he did not crash into the runway; that he landed the plane but it was not a nice smooth landing; but it was not extremely hard either; that the plane maybe bounced back in the air 2 or 3 feet and came down and all the tires on the aircraft were intact; the landing gear was all intact and there were no blowouts; that as it started to roll down the runway the nosewheel retracted suddenly into the wheel well when he got another wind shear and the plane drifted to the left; that after the nosewheel retracted the nose went down and the propeller dropped into the runway asphalt and the plane stopped about 200 feet down the runway; that once he stopped he asked everybody in the plane if anyone was hurt and they told him that they were not hurt; that he called the tower and told him he was dead on the runway; that there were other planes landing on some other runway; that the emergency crew got there in a matter of minutes and they asked if anyone was hurt and all the passengers refused medical service; that just

before they landed there was not any severe turbulence; that he had never had an incident happen like this before; that he did not feel like he had done anything wrong that day; that the FAA did not charge him with flying into a thunderstorm *and he was never charged with any negligent act in this incident.*

Importantly, the thunderstorm had already passed over Luttrell's end of the runway and there was no thunderstorm in progress at the airport at the time of his landing. In addition, the thunderstorm actually was moving *away* from Luttrell – a significant point because it is in the leading edge of a storm that downdrafts and updrafts are primarily located.

Because the thunderstorm had "passed" before Luttrell tried to land, and because other planes were landing and taking off at that time, the jury reasonably could have inferred that the dangers of wind shear had passed also. In fact, they could have inferred that the turbulence he encountered on landing was not caused by the thunderstorm at all. Luttrell's conduct, in fact, complied with the standards set by Petitioner's own expert, Norman Horton. Mr. Horton testified that a pilot should either: (1) wait for a thunderstorm to pass or (2) land at an alternate airport. Pilot Luttrell waited for the storm to pass.

Mr. Horton also testified that there is always wind shear with a thunderstorm or a serious frontal disturbance, and that he faulted the pilot for flying into a thunderstorm of which he had been warned about ten minutes before he arrived at the airport. However, Mr. Horton admitted that he was assuming the pilot flew into a thunderstorm. Mr. Horton also admitted that wind

shear is a relatively common phenomenon at airports such as El Paso virtually the entire spring, summer and fall; that it is not uncommon in a desert/mountain environment like this to have a wind shear advisory; that as a pilot is coming down there is nothing on his plane that can detect wind shear because it is invisible; and that simpiy because a tower warns a pilot that there is wind shear in the area does not mean that he can not land.

Mr. Horton further admitted that he did not investigate this accident but merely analyzed the accident based on the investigation of others, principally the Federal Aviation Administration investigation report (its findings are discussed *infra*).

Horton agreed that the pilot is the final authority as to what he is going to do; that the pilot had landing clearance, i.e., permission to land, from the airport controller; that the tower did not close the airport on this occasion and the controllers in the tower did not tell the pilot he could not land; that the FAA had the authority to charge the pilot with negligence for flying into a storm, landing during wind shear, any of those things; but that they did not charge him nor did they make findings of negligence in how he landed or operated the airplane.

According to Mr. Horton, wind shears are "invisible" and planes have no instruments capable of detecting them. Thus, wind shears are a weather condition and fall within the category of non-human, environmental conditions for which the instruction of unavoidable accident is proper.

In addition, the jury could have reasoned that another non-human condition caused the accident, i.e.,

the nosegear's retracting. Texas courts have found that unavoidable accident instructions are proper in cases of mechanical or equipment failures. *McDonald v. Brennan*, 704 S.W.2d 136, 138 (Tex. App. – El Paso, 1986, writ refused n.r.e.); *Thurman v. Chandler*, 125 Tex. 34, 81 S.W.2d 489, 491 (1935).

Mr. Luttrell testified that the plane landed with all tires and landing gear intact. After the plane was taxiing down the runway, the nosewheel retracted on its own. It actually "[w]ent back up in the wheel weld (sic)". It unlocked itself, though it had been locked in place before landing. After the nose wheel retracted, the propeller dropped to the asphalt of the runway. This was the movement that set off the emergency signal, not the landing at all. The jury could reasonably have inferred that, since the landing was not hard enough to set off the ELT, the nosegear's retracting was a mechanical failure responsible for the accident and one for which Mr. Luttrell was not responsible.

There is no suggestion that Luttrell had not thoroughly checked the plane on the day of the accident. No evidence was presented that ruled out the incident's being caused by a mechanical or equipment failure. The jury could well have reasoned that the plane was damaged and the accident caused by the nosewheel's retracting – not the landing – and that Luttrell's conduct had nothing whatsoever to do with such failure.

II. The Writ Should Be Denied Because State Courts Committed No Reversible Error in Submitting Question No. 1 to the Jury Concerning the Defendants' Negligence and Causation of the Occurrence in Question since a Violation of Part 135 of the Federal Aviation Regulations is Not Negligence Per Se and Could Not Have Been a Proximate Cause of the Occurrence in Question.

In the plaintiff's first amended petition on which he went to trial in this case, the Petitioner alleged that the defendants were negligent because they failed to comply with a federal safety regulation, Federal Aviation Regulation (FAR) Part 135, as set forth more fully in the report of the FAA investigator on this accident, Mr. Dale Horner.

Federal Aviation Regulation Part 135 pertains to "Air Taxi Operators and Commercial Operators" and the applicable part cited by Petitioner in his application for writ of certiorari is Section 135.5 pertaining to certificate and operations specification which provides:

> "No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part . . . "

The Petitioner's expert witness, Norman Lewis Horton, testified at the trial of this case that the Federal Aviation Administration (FAA) cited Warren Luttrell for violating Section 135.5 of the Federal Aviation Regulations because he operated an aircraft without holding an air taxi/commercial operating certificate; that is, he did not have a proper license. However, Horton admitted that the FAA did not charge Luttrell or make any findings of

negligence in how he landed or operated the airplane. Specifically, Horton testified that the FAA determined an "incident" – not an accident – occurred and that the incident was the result of a hard landing. The FAA further did not find the pilot negligent for flying into a thunderstorm or for landing the plane in any way or for landing in a thunderstorm or for flying VFR as opposed to IFR. Further, he testified that the airport was not closed and the pilot was not told he could not land.

Petitioner contends that the defendants, Jackie Holmes, the owner of the airplane, and Warren Luttrell, the pilot, did not have the requisite air-taxi commercial operator's certificate and therefore violated this regulation and that such violation was negligence per se and as a matter of law, such negligence was a proximate cause or cause in whole or in part of the occurrence in question.

Petitioner concedes in his petition for writ of certiorari that neither any Texas court nor the Fifth Circuit Court of Appeals has ruled that the violation of a Federal Aviation Regulation establishes negligence per se. Certainly the regulation cited by Petitioner is not a "pilot rule of the road" that is designed to avoid accidents involving airplanes; and Petitioner cites no case authority or legislative history to show that FAR § 135.5 was designed to prevent or minimize injuries. While Petitioner cites two cases to support his contention that violations of FAR regulations constitute negligence per se, both are distinguishible from the instant case. *In Re N-500L Cases*, 691 F.2d 15 (1st Cir. 1982), did not involve a violation of § 135.5 (the licensing provision pertinent in the case), but rather focused on the pilot's "Rules of the Road" found in FAR Part 91. 691 F.2d 15, 28, 34. Similarly,

Gatenby v. Altoona Aviation Corp., 407 F.2d 443, 447 (3rd Cir. 1968), did not involve § 135.5, but rather dealt with safety standards. In the case of *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987) cited and relied upon by Petitioner, the Texas Supreme Court pointed out:

> " . . . The unexcused violation of a *statute setting an applicable standard of care constitutes negligence as a matter of law if the statute is designed to prevent an injury to that class* of persons to which the injured party belongs . . . " (Emphasis supplied)

732 S.W.2d 306, 312.

The FAR regulation relied on here is not negligence per se. It does not set an applicable standard of care, such as excessive speed, yielding the right of way, etc. Further, the Petitioner has not shown that the statute is designed to prevent an injury to that class of persons to which the Petitioner belongs.

To the contrary, Section 135.5 of the Federal Aviation Regulations is similar to the Texas driver's license requirements, Article *6687b*, Vernon's Texas Revised Civil Statutes. In *Flanigan v. Carswell*, 159 S.W.2d 598, 324 S.W.2d 835 (1959), the Texas Supreme Court rejected the Petitioner's contention that the failure to have a proper driver's license was negligence per se and a proximate cause of a collision with this observation:

> "We hold in this case that the failure of Carswell to secure a chauffeur's license, as required by statute, was not as a matter of law a proximate cause of the collision between the

> two motor vehicles involved. No fact issue on the question is raised . . . "

324 S.W.2d 835, 838.

See also, Medina v. Salinas, 736 S.W.2d 224 (Tex.App. – Corpus Christi, 1987, writ denied) and *Langdeau v. Pittman,* 337 S.W.2d 343 (Tex.Civ.App. – Austin 1960, writ refused n.r.e.).

Similarly, lack of an air-taxi/commercial operator's certificate does not, as a matter of law, make the pilot of the plane, Warren Luttrell, liable or constitute a proximate cause of the occurrence made the basis of this lawsuit.

Other Texas decisions have refused to apply negligence per se to statutory violations.

In *Continental Oil Co. v. Simpson,* 604 S.W.2d 530 (Tex.Civ.App. – Amarillo 1980, writ refused n.r.e.) the appellate court reversed and rendered judgment for the defendant, holding that the trial court erred in concluding that the failure of Continental to comply with a provision of tariff rules promulgated by the Railroad Commission of Texas was negligence per se and such noncompliance was a proximate cause of the occurrence. In doing so, the Texas appellate court noted:

> "The availability of the negligence per se rule does not mean that it is applied obdurately to the violation of every administrative rule or regulation. Neither does the mere fact that an administrative agency promulgates a rule or regulation mean that the courts must accept it as a standard for civil liability. *Carter v. William Sommerville and Son, Inc.,* 584 S.W.2d 274, 278

> (Tex. 1979). Indeed, the language of the rule comports with the principle that the power of adopting or rejecting a standard of conduct rests with the civil courts. *Rudes v. Gottschalk*, 159 Tex. 552, 324 S.W.2d 201, 205 (1959) . . . "

604 S.W.2d 530, 534.

In *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 631 (Tex. 1986), where the plaintiff admittedly was exceeding the statutory speed limit, the Texas Supreme Court held that the court of appeals erred in treating the statutory violation of the speed limit as negligence per se.

Similarly, the Third Circuit held that the violation of an OSHA regulation does not constitute negligence per se in an FELA case. *Ries v. National Railroad Passenger Corporation*, 960 F.2d 1156, 1158-65 (3rd Cir., 1992). The violation of Federal Aviation Regulation 135.5 is not negligence per se and could not be a proximate cause of the occurrence in question as a matter of law.

Petitioner argues that even if a violation of FAR Part 135 does not constitute negligence per se as to all Respondents, it does as to the pilot and should be attributed as a matter of law to Southern Pacific because the pilot was an agent of Southern Pacific under FELA.

However, Petitioner failed to show as a matter of law that Warren Luttrell was acting as an agent of Southern Pacific Transportation Company on the occasion in question and failed to raise this legal sufficiency issue before the trial court either through a motion for directed verdict, an objection to the court's charge, a motion for judgment *non obstante veredicto*, or a motion for new trial.

Petitioner, thus, waived the issue of whether Warren Luttrell, as a *matter of law*, was an agent of Southern Pacific. In *Allison v. Parks*, 763 S.W.2d 606 (Tex.App. – Fort Worth 1989, error denied), the court noted that appellants, in their motion for judgment notwithstanding the verdict, did not raise the issue of whether an easement was established as a matter of law, but rather raised points of no evidence or factually insufficient evidence. 763 S.W.2d 606, 607-8.

The *Allison* court held the "matter of law" point had not been preserved on appeal because:

> "The proper predicate for preserving a legal sufficiency point of error is to raise the issue in either a motion for instructed verdict, an objection to the submission of a vital fact issue, a motion to disregard the jury finding, a motion for judgment notwithstanding the verdict, or a motion for a new trial. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985)." 763 S.W.2d 606, 607.

Similarly, Petitioner in the instant case never raised his matter of law point through any of the procedures required by *Allison*. Petitioner did not file a motion for instructed verdict, a motion to disregard the jury finding, or a motion for judgment *non obstante veredicto*. Further, the issue of whether Luttrell was an agent of Southern Pacific's as a matter of law was never raised in Petitioner's objections to the charge nor was it raised in Petitioner's Motion for New Trial. Petitioner therefore waived the point of error of whether Warren Luttrell, as a matter of law, was Southern Pacific's agent.

Moreover, Warren Luttrell testified that he was self-employed, and he did not work for anyone. He was not paid directly by Southern Pacific. Importantly, he had no dealings with Southern Pacific at all regarding hiring him to fly.

Therefore, whether Warren Luttrell was an agent for Southern Pacific Transportation Company was an issue of fact for the jury, and was not established as a matter of law.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent, Southern Pacific Transportation Company, respectfully submits that the Petition for Writ of Certiorari be denied in all respects and that this respondent receive such other and further relief to which it may be entitled.

Respectfully submitted,

DEWEY J. GONSOULIN
Counsel of Record
DANIEL V. FLATTEN
ELIZABETH C. LAZENBY
MEHAFFY & WEBER
P.O. Box 16
Beaumont, Texas 77704
Telephone: 409/835-5011

Attorneys for Respondent,
Southern Pacific Transportation Company

APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

No. 09-91-284-CV

NICK GARCIA, Appellant

V.

SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, WARREN LUTTRELL, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellees

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On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-136,293

OPINION

This is the appeal of a take-nothing judgment in a jury trial of a suit for negligence at common law and under the Federal Employers' Liability Act (FELA). Nick Garcia was one of several employees of Southern Pacific Transportation Company being flown by airplane from Tucumcari, New Mexico to El Paso, Texas. Garcia alleged he received injuries during landing because the plane encountered a wind shear created by thunderstorm. Garcia raises four points of error on appeal, to-wit:

Point of error one: The trial court erred in submitting an instruction to the jury on "unavoidable accident," because there was no evidence of an unavoidable accident in this case and as a matter of law an instruction on unavoidable accident is improper in an FELA case.

Point of error two: The trial court erred in submitting Question One to the jury concerning the Defendants' negligence and causation of the occurrence in question, because the evidence conclusively established that all of the Defendants were negligent per se in conducting an unauthorized commercial aircraft operation for compensation or hire in violation of Part 135 of the Federal Aviation Regulations, and that such violation was a proximate cause and/or a cause in whole or in part of the occurrence in question.

Point of error three: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Warren Luttrell because the jury's "no" answer to Question One(b), concerning whether the conduct of Warren Luttrell was negligent and a cause in whole or in part of the occurrence in question, is contrary to the overwhelming weight of the evidence.

Point of error four: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Southern Pacific Transportation Company because as a matter of law Warren Luttrell was acting as an agent of Southern Pacific on the occasion in question.

Question One was a global submission of all elements of the cause of action under common-law negligence and FELA as to all defendants, as follows:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, *and injury, if any*[1], to Nick Garcia:

Answer "Yes" or "No" to each of the following:

Answer "Yes" or "No"

	Proximate Cause	Cause in whole or in part
a. Jackie Holmes	No	No (10-2)
b. Warren Luttrell	No	No (10-2)
c. Gene's Flight Club of El Paso, Inc.	No	No (unam.)
d. Mike Warren	No	No (unam.)
e. Southern Pacific	No	No (unam.)

All of Garcia's points of error either challenge the charge given on the negligence and causation issues, or the sufficiency of the evidence to support the jury's finding on the negligence and causation issues. None of the points of error, or the arguments under the points of error, urge that the jury finding of no injury is against the overwhelming weight and preponderance of the evidence, or that injury was established as a matter of law. Garcia did not seek medical attention for two weeks after the incident, although he has since received treatment for a back injury. Injury was an issue at trial, but even if it was not, injury was included within Question One. The jury could have determined that, although all of the

---

[1] Emphasis added.

defendants were negligent and their negligence caused the occurrence, Garcia received no injury. Such a finding would result in the answer given by the jury in this case and the take nothing judgment would then be proper unless appellant successfully challenged the "no injury" finding on appeal.

Modern jury charge practice normally combines the injury issue with the damages question. Although the "Van Zandt"[2] issue is not utilized in modern jury charge practice, the issue here is one of appellate procedure rather than charge procedure. Error in the submission of an issue is harmless when the findings of the jury in answer to other issues are sufficient to support the judgment. *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749 (Tex. 1980); *Texas Const. Service Co. of Austin v. Allen*, 635 S.W.2d 810, 814 (Tex. App. – Corpus Christi 1982, writ ref'd n.r.e.). It is appropriate to submit a global charge to the jury, but to then obtain a reversal of the judgment entered on the jury's verdict, the appealing party must attack each and every ground upon which the verdict might have been rendered. The omission of any possible ground upon which the judgment might have been rendered compels the appellate court to affirm the judgment

---

[2] Under the former special issue practice, when the existence of an injury was controverted it was not a sufficient submission of that ultimate fact issue, over objection, to inquire whether a particular negligence act was a proximate cause of plaintiff's injuries, if any, or what amount of money will compensate the plaintiff for the injuries, if any, sustained as a proximate result of the defendant's negligence, if any. *Texas & Pacific Railway Company v. Van Zandt*, 159 Tex. 178, 317 S.W.2d 528 (1958).

as it finds support in grounds not raised as error on appeal. When the jury fails to find that the plaintiff has been injured, all other issues become immaterial. *Burnett v. File*, 552 S.W.2d 955, 958 (Tex. Civ. App. – Waco 1977, writ ref'd n.r.e.). This is similar to the situation which arises when the jury finds negligence but fails to find damages; the plaintiff must challenge both findings to obtain reversal on appeal. *Tate v. Sharp*, 831 S.W.2d 899, 900 (Tex. App. – Beaumont 1992, no writ). Assuming we find error in each of the points of error, we cannot find that the trial court erred in entering the take-nothing judgment because appellant does not challenge the implied finding that he failed to prove injury by a preponderance of the evidence.

We are not authorized to reverse the judgment of the trial court unless the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. TEX. R. APP. P. 81(b)(1). The broad form jury question combined negligence, proximate cause and injury. If negligence and proximate cause were found by the jury, but no injury, the jury would have answered "no" to all defendants, as it did. Assuming without deciding that such a "no injury" finding would be against the overwhelming weight and preponderance of the evidence, appellant does not challenge such a finding by point of error. Therefore, there is a theory submitted to the jury which supports the take-nothing judgment regardless of the merit of appellant's points of error.

Points of error one through four are overruled. The judgment is affirmed.

AFFIRMED.

PER CURIAM

Opinion Delivered
December 3, 1992
Do Not Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

(3)

Supreme Court, U.S.
FILED
OCT - 3 1993
OFFICE OF THE CLERK

No. 93-334

In The

Supreme Court of the United States

October Term, 1993

NICK GARCIA,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO and WARREN LUTTRELL,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth District of Texas

BRIEF IN OPPOSITION FOR RESPONDENTS SOUTHWEST AIR LEASING, JACKIE HOLMES AND WARREN LUTTRELL

EDWARD H. GREEN
WELLER & GREEN, L.L.P.
Attorneys for Respondents Southwest Air Leasing, Jackie Holmes and Warren Luttrell
P.O. Box 350
Beaumont, Texas 77704-0350
(409) 838-0101

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the submission of an "unavoidable accident" instruction to the jury by the Texas state trial court constituted reversible error as a matter of law when the case involves both common-law and FELA defendants, thus requiring a new trial on Petitioner's claim for injuries arising out of the landing of an airplane which Respondents were using for "dead heading" crew members from New Mexico to Texas.

2. Whether as a matter of federal FELA law the Respondent railroad or the other Respondents involved in the air transportation of Petitioner and fellow railroad crew members were negligent per se in conducting an unauthorized commercial aircraft operation in violation of Part 135 of the Federal Aviation Regulations, and that such violation was a proximate cause and/or cause in whole or in part of the occurrence in question.

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STATEMENT OF THE CASE

This is a suit by the Petitioner, Nick Garcia, seeking to recover actual and punitive damages arising out of an airplane incident that occurred at the El Paso International Airport on August 2, 1988. At the time, the Petitioner was a member of Southern Pacific Transportation Company's train crew which was being flown from Tucumcari, New Mexico to El Paso, Texas. The aircraft being used at the time was owned by Respondent, Jackie Holmes, and operated by Respondent, Warren Luttrell.

At the time of the incident Luttrell was returning from a round trip air flight from El Paso to Tucumcari. Luttrell, who was self-employed, had been approached by Respondent, Gene's Flight Club, about picking up Southern Pacific employees who had been working in New Mexico and returning them to El Paso. The Gene's Flight Club employee who normally flew this route was unavailable on this date, therefore Luttrell agreed to fly this round trip flight on this occasion.

Luttrell had no difficulties with the weather or anything else on the initial flight from El Paso to Tucumcari, where he picked up the South Pacific employees. Prior to and during the return flight to El Paso, Luttrell checked the El Paso weather forecast and was advised that there were no problems. Luttrell was subsequently made aware of the fact that a thunderstorm was in progress over the El Paso International Airport. As the plane was approximately 40 miles northeast of the airport, Luttrell was told by the El Paso Airport personnel that the airport was switching to Instrument Flight Rules. Pursuant to this relayed information, Luttrell confirmed that his airplane was equipped with IFR equipment and requested a runway approach. Throughout this period of time, Luttrell kept in constant communication with the El Paso International Airport personnel. When Luttrell was approximately eight to ten miles from the runway, he was turned over to the tower

at the El Paso International Airport and about that time he was close enough to visually see the beginning of the runway. So although the above-mentioned thunderstorm was visible, it was just as evident to Luttrell that the thunderstorm had clearly moved out of the vicinity of his approach to the El Paso International Airport. Luttrell was issued wind shear advisory information by the airport tower and was also given clearance to land his airplane.

As Luttrell approached the El Paso International Airport, the airport tower continued to allow him to land the airplane. Luttrell saw other airplanes landing and taking off from the El Paso International Airport as he was coming down to the runway. As he approached the end of the runway, a mild wind shift occurred, which is not an unusual situation. With the airplane approximately ten feet above the runway, Luttrell encountered an unexpected weather condition which caused the airplane to suddenly drop. The airplane came down on its nose at the side of the runway.

Subsequent to the incident at the El Paso International Airport, Petitioner received medical care for injuries he allegedly sustained in the incident. Petitioner was seen in the emergency room immediately following the incident and did not seek further medical treatment until approximately two weeks later. During this lapse of time, Petitioner flew to New Jersey. Since the airplane incident, Petitioner has been working out lifting weights on a regular basis. In fact, Petitioner's medical records reflect that the Petitioner had "large upper extremities secondary to his workout activity." As a result of this incident, Petitioner brought suit against the several Respondents based on common-law negligence, negligence under the FELA and violations of Federal Aviation Regulations.

REASONS FOR DENYING THE WRIT

I.

REVIEW SHOULD BE DENIED BECAUSE THE SUBMISSION OF AN "UNAVOIDABLE ACCIDENT" INSTRUCTION TO THE JURY BY THE TEXAS STATE TRIAL COURT WAS PROPER IN THIS CASE SINCE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE INSTRUCTION AND THIS CASE INVOLVED BOTH COMMON-LAW AND FELA DEFENDANTS.

While Petitioner may have had a FELA case against Southern Pacific Transportation Company, his lawsuit against Respondents, Warren Luttrell, Jackie Holmes and Southwest Air Leasing was based on common-law. As such, Respondents were entitled to an unavoidable accident instruction if raised by the evidence. The question to be determined by the trial court was whether there was *some* evidence presented at trial supporting a reasonable inference of unavoidable accident. *Baytown Construction Company v. City of Port Arthur,* 792 S.W. 2d 554, 562 (Tex. App. - Beaumont 1990, no writ); *citing Garza v. Alviar,* 395 S.W. 2d 821 (Tex. 1965). An unavoidable accident is present when an event occurs which was not proximately caused by the negligence of any party to the event. *Yarborough v. Berner,* 467 S.W. 2d 188 (Tex. 1971); *Dallas Railway & Terminal Co. v. Bailey,* 151 Tex. 359, 250 S.W. 2d 379 (1952). Physical conditions or circumstances ("nonhuman" ones) can result in unavoidable accidents. *Yarborough* at 191. An instruction on unavoidable accident is ordinarily given in cases involving "environmental conditions such as fog, snow, sleet, wet or slick pavement, or obstruction of view." *Hill v. Winn Dixie Texas, Inc.,* 849 S.W. 2d 802 (Tex. 1992). Such as instruction was proper in the instant case which involves non-human, environmental conditions or weather factors, *i.e.,* a thunderstorm, with accompanying wind currents.

During the testimony of Warren Luttrell, there was dispute as to whether a wind shear or wind shift caused the incident. Luttrell described the unforeseeable weather phenomenon that he encountered as he approached the runway at El Paso International Airport as "some sort of wind shift." Luttrell further confirmed the fact that there was *not* a thunderstorm directly over the El Paso International Airport and the sudden weather phenomenon Luttrell encountered while over the runway was unforeseeable. During the flight to El Paso, Luttrell contacted the flight service station in Roswell, New Mexico (which is about halfway between Tucumcari, New Mexico and El Paso, Texas) and was assured that the weather was fine. When he was about 25 to 28 miles away from the El Paso International Airport, Luttrell contacted the approach control and was informed that there were no problems with the weather. As he approached the runway, Luttrell testified that he could see that the thunderstorm had already passed over the area of his approach to the El Paso International Airport and that he was not flying into the thunderstorm. Luttrell was given clearance to land his airplane as he approached the runway. Luttrell testified that at the same time he was coming down onto the runway there were other planes taking off and landing. As set out above, Luttrell testified that he encountered an "unexpected" weather condition which caused his plane to drop, and this occurred while the plane was only 10 to 12 feet above the runway.

The above-mentioned testimony definitely points to the conclusion that the evidence presented at trial, when viewed in the light most favorable to the jury's finding, supports the instruction to the jury on "unavoidable accident." There existed at the trial at least *some* evidence of unavoidable accident. Any inferences to the contrary are not permissible under accepted standards of appellate review.

Further, Petitioner argues that an instruction on unavoidable accident was improper in a FELA case. This particular complaint

regarding this instruction was made for the first time, on appeal and therefore the error was waived. *George Pharis Chevrolet, Inc. v. Polk*, 661 S.W. 2d 314, 317 (Tex. App. - Houston [1st Dist.] 1983, no writ).

Further, even though Petitioner objected to the "unavoidable accident" charge on other grounds, a separate and distinct objection on the grounds offered on appeal was not made at the trial level and therefore such objection was waived. The grounds for new trial on appeal must be the same ones made in objection to the charge. *See Gibson v. Northeast National Bank*, 602 S.W. 2d 337, 340 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.); *Eckert v. Smith*, 589 S.W. 2d 533 (Tex. Civ. App. - Amarillo 1979, writ ref'd n.r.e.); and *Precision Motors v. Cornish*, 413 S.W. 2d 752 (Tex. Civ. App. - Dallas 1967, writ ref'd n.r.e.). Petitioner has waived his objection.

Petitioner cites *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), and *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966) as supporting his contention that the unavoidable accident instruction should not have been given in this case. However, neither the *Page* case nor *Mills* case involved any common defendants. Because neither case involved any such defendant, they are not applicable to the case at bar where such common-law defendants exist.

In *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973), the court reviewed a cause of action which involved *both FELA* and *common-law defendants*. In *Smith*, the plaintiff, both in his complaint and at trial attributed the accident in question to a number of causes involving several defendants. The *Smith* court held that the trial court's instruction on unavoidable accident was indeed proper. The court reasoned that, "There was no substantial proof that any of these possible causes had in fact caused the accident, and the Plaintiff in making his case constantly

shifted ground in trying to fix liability for his injury on one or the other of the Defendants." Thus, the court continued, it was "as plausible to find the accident a result of unavoidable causes as it was to find the accident the result of any of the alternative causes cited by the Plaintiff." Therefore, an instruction on unavoidable accident was proper. *Smith* at 946.

II.

REVIEW SHOULD BE DENIED BECAUSE AN UNAUTHORIZED COMMERCIAL AIRCRAFT OPERATION IN VIOLATION OF PART 135 OF THE FEDERAL AVIATION REGULATIONS IS NOT NEGLIGENT PER SE IN THAT SAID VIOLATION WAS NOT A PROXIMATE CAUSE AND/OR A CAUSE IN WHOLE OR IN PART OF THE OCCURRENCE IN QUESTION.

A. Federal Aviation Regulation § 135 Is Not Designed To Prevent Injury, But Is Merely A Commercial Licensing Requirement.

Violations of statutes or regulations are considered as negligence per se only if the statutes or regulations are "designed to prevent an injury to that class of persons to which the injured party belongs." *El Chico Corp. v. Poole,* 732 S.W. 2d 306, 312 (Tex. 1987). Petitioner assumes that F.A.R. § 135 is designed to prevent or minimize injuries. However, he has pointed to no concrete case authority, legislative history or anything else of this sort to show that this is indeed the case. Petitioner states that a few cases decided by the Fifth Circuit mentioned that the F.A.R.'s "have the force and effect of law," but this blanket reference begs the material question in this matter, which is:

> Is the particular F.A.R. section in question (135) designed to protect a person such as Nick Garcia from the injury complained of?

No Texas court has ruled on whether the violation of Federal Aviation Regulations established negligence per se. However, at least one Texas court has dealt with this negligence per se issue as it deals with administrative regulations in general. In *Continental Oil Co. v. Simpson,* 604 S.W. 2d 530 (Tex. Civ. App. - Amarillo 1980, writ ref'd n.r.e.), the Amarillo Court of Appeals addressed the matter as follows:

> The availability of the negligence per se rule does not mean that it is applied obdurately to the violation of every administrative rule or regulation. Neither does the mere fact that an administrative agency promulgates a rule or regulation mean that the courts must accept it as a standard for civil liability.

Continental at 534.

Further, the Texas Supreme Court in *Carter v. William Sommerville & Son, Inc.,* 584 S.W. 2d 274 (Tex. 1979) stated:

> Negligence per se is a tort concept whereby a legislatively imposed *standard of conduct* is adopted by the civil courts as defining the conduct of a reasonably prudent person. (emphasis added)

Carter at 278.

As the Texas Supreme Court pointed out, the doctrine of negligence per se is applied only when the statute or regulation *defines a conduct* of individuals or entities in certain situations. In fact, when the *Carter* court later went on to list examples of statutes or regulations the violations of which would constitute negligence per se, *all the statutes and regulations listed by the court mentioned specifically defined conduct. Carter* at 278.

F.A.R. § 135 does not define any type of conduct upon which to analyze negligence per se issues. The relevant part of the Federal Aviation Regulations which would define conduct would be "Subpart D — VFR/IFR Operating Limitations and Weather Requirements." These Visual Flight Regulations govern the pilot's duties while operating aircraft under various conditions and flight rules. As such, these standards of conduct defined in this subpart are the pertinent regulations that are "designed to protect the safety of passengers on such commercial flights." In fact, the court in *Transco Leasing Corp. v. United States,* 896 F.2d 1435 (5th Cir. 1990), *rehearing denied in part and granted in part on other grounds,* 905 F.2d 61 (5th Cir. 1990), analyzed that particular negligence per se issue by looking not to general licensing requirements, but rather to F.A.R. § 91.67, which is one of the Visual Flight Regulations of § 91.1, *et seq. Transco* at 1446. Further, the court in another case, *Gatenby v. Altsona Aviation Corp.,* 407 F.2d 443 (3rd Cir. 1968), also analyzed its negligence per se issue by looking to whether the pilot abided by *Visual Flight Regulations.* The fact remains that Mr. Luttrell has never been found to have been in violation of any subsections of the *Visual Flight Regulations* of the Federal Aviation Regulations.

B. The Alleged Violation of F.A.R. § 135 Did Not Proximately Cause The Complained Of Accident.

Even if Respondent was found to be "negligent per se" through violation of a statute or regulation designed to prevent an injury to a class of persons of which the Petitioner was a member, the negligence inquiry does not stop at that point. In order for liability to attach, the Petitioner must have also shown that the Respondent's negligence *proximately caused* the injury. *Carter* at 278. "Proximate cause in Texas law consists of two elements: (1) cause in fact ('but for' causation) and (2) forseeability." *See In Re: Air Crash at Dallas/Fort Worth Airport,* 919 F.2d 1079, 1085 (5th Cir. 1991). "Cause in fact means that the negligent act at issue was a substantial factor in producing the injury, and without such

negligence no harm would have resulted." *See Brown v. Edwards Transfer Co. Inc.*, 764 S.W. 2d 220, 223 (Tex. 1988), citing *Nixon v. Mr. Property Management Corp.*, 690 S.W. 2d 546, 549 (Tex. 1985). F.A.R. § 135 played no part in Mr. Luttrell's thought processes and professional judgment calls as he was approaching the El Paso International Airport. Luttrell's encounter with the unexpected wind shift as he was approaching the runway on the day in question would have occurred regardless of whether or not Luttrell complied with F.A.R. § 135. Thus, no "but for" causation exists that would support Petitioner's negligence per se claim.

CONCLUSION

Petitioner, Nick Garcia, received a proper and fair submission of each of his claims against all Respondents in the trial of this cause of action from which this appeal was taken. Based upon all of the foregoing authorities, Nick Garcia's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD H. GREEN
Counsel of Record
WELLER & GREEN, L.L.P.
Attorneys for Respondents Southwest Air Leasing, Jackie Holmes and Warren Luttrell
P.O. Box 350
Beaumont, Texas 77704-0350
(409) 838-0101